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No. 82-976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

PETITION FOR REHEARING UPON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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The People of the State of California, the petitioner in this proceeding, respectfully petitions for rehearing of the order of the Court entered on April 30, 1984 denying the petition for writ of certiorari to the Court of Appeal of the State of California, Fifth Appellate District. Rehearing is justified on the grounds of "intervening circumstances of

substantial or controlling effect" and "other substantial grounds not previously presented". (Rule 51.2, Rules of the United States Supreme Court.)

REASONS FOR GRANTING PETITION FOR REHEARING

REHEARING OF THIS CASE IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND TO PROMOTE THE INTERESTS OF JUSTICE.

On April 30, 1984 this Court denied the petition for writ of certiorari in the above-entitled matter. In so doing, it let stand a California decision reversing respondent's murder conviction on the ground that critical evidence, his confession, should have been excluded from his trial pursuant to Miranda v. Arizona (1966) 384 U.S. 436. Petitioner submits that a rehearing of its petition in this matter is now necessary to secure uniformity of decision and promote the interests of justice in light of this Court's opinion in the case

of respondent's accomplice, Jerry Beheler (California v. Beheler (1983) ____U.S.____ [103 S.Ct. 3517, 77 L.Ed.2d 1275] and subsequent California appellate decisions in People v. Beheler (1984) 153 Cal.App.3d 242 and People v. Dillon (1983) 34 Cal.3d 441.

This Court's Beheler opinion was issued subsequent to the filing of the petition in the instant case. Thus, petitioner has not had the opportunity to argue the similarities between the Beheler case and the instant case. Such an examination quickly demonstrates that Beheler should have been dispositive.

Both men were interviewed at a police station after voluntarily contacting the police about their involvement in the felony-murder of Peggy Dean. 1/ Neither of them were advised

1/ This discussion of facts is based on this Court's statement in California v. Beheler, supra, 103 S.Ct. at 3518, 77 L.Ed.2d at 1277-1278, as well as the summary of facts in the original lower court opinions in respondent's and Beheler's cases. These latter two opinions are attached to this petition as appendices A and B, respectively.

of their constitutional rights pursuant to Miranda v. Arizona, supra, prior to their brief interviews, but both returned home after talking to the police. In subsequent interviews, both men agreed that they had voluntarily talked to the police in the first interviews. Respondent also agreed that he had not been "in custody" during the first interview.

In reversing their convictions, the California Court of Appeal concluded that the initial interviews of Beheler and respondent were both "custodial interrogations" and that they should have been advised of their constitutional rights under Miranda v. Arizona, supra. In so concluding, the court found it significant that the interviews occurred at a police station, that the two men were suspects in the Dean murder, and that their interviews were "interrogations". Yet, in both cases, the lower court concluded that neither Beheler nor the respondent were under arrest. (App. A at pp. 21-35, App. B at

pp. 18-37.)

This Court concluded that the lower court's reversal of Beheler's conviction was "in conflict" with long-settled decisions. (Rule 17.1(c), Rules of the United States Supreme Court; California v. Beheler, supra, 103 S.Ct. at 3518; 77 L.Ed.2d at 1277.) It rejected the lower court's effort to "distinguish" Beheler's case from Oregon v. Mathiason (1976) 429 U.S. 492. (California v. Beheler, supra, 103 S.Ct. at 3519; 77 L.Ed.2d at 1279.) This Court upheld Beheler's conviction by explaining that the "ultimate inquiry" in determining whether a suspect is "'in custody' for purposes of receiving Miranda protection . . . is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest". (California v. Beheler, supra, 103 S.Ct. at 3520, 77 L.Ed.2d at 1279) (citation omitted).

Likewise, respondent was neither under

arrest nor its equivalent at the time he confessed. Indeed, the lower court concluded that "indicia of arrest were not present" in respondent's case while in Beheler's case it merely concluded that there was "little indicia of arrest". (Compare App. A at p. 30 with App. B at p. 33.)

Furthermore, it is irrelevant that the police knew more about respondent's involvement in the Dean murder than Beheler's, since respondent initiated the police contact and was not otherwise in custody. (California v. Beheler, supra, 103 S.Ct. at 3520, 77 Cal.Ed. 2d at 1280.) It is true, of course, that respondent knew the police wanted to talk to him and that the police never specifically advised him that he was not under arrest. However, it is undisputed that respondent voluntarily contacted the police because he did not believe he would be held in custody. (App. A at p. 16.)

Truly, under the lower court's own analysis, the facts of this case are even more compelling than Beheler's that respondent was not subjected to the "inherent coercion" of a "custodial interrogation" as described in Miranda v. Arizona, supra. Even if this Court was simply to remand respondent's case in light of California v. Beheler, supra, his conviction would be upheld. 2/

Petitioner is aware, of course, that review by certiorari is not a matter of right. (Rule 17.1, Rules of the United States Supreme Court.) This Court has chosen to make its point about the limits of its Miranda decision by hearing Beheler's case and not respondent's. However, the identity of respondent's and Beheler's case is not the only reason that

2/ It should be noted that the lower court has rejected any attempt to ignore California v. Beheler, supra, on "independent state grounds." (People v. Beheler, supra, 153 Cal.App.3d at 246.)

this petition should be granted. Related developments in the Beheler case also demonstrate the necessity for upholding respondent's conviction.

This Court's treatment of respondent's case could have a direct impact on the ultimate disposition in Beheler's case. As already noted, Beheler's murder conviction has now been affirmed by the California Court of Appeal. However, pursuant to People v. Dillon, supra, the same court has modified Beheler's murder judgment to voluntary manslaughter. (People v. Beheler, supra, 153 Cal. App.3d at 260-261.)

Following Dillon, the California Court of Appeals rejected an attack on California's first degree felony-murder rule, but chose to reduce Beheler's conviction from first degree murder to voluntary manslaughter under cruel and unusual punishment principles. (People v. Beheler, supra, 153 Cal.App.3d at 260-261.)

This feat was accomplished through an analysis of the facts and circumstances of Beheler's offense, including a comparison of his punishment with that of his accomplices. 3/ The appeals court noted that respondent in this case received the same sentence as Beheler, life without the possibility of parole, but also opined that respondent "was more culpable than Beheler because Howard provided the murder

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3/ This entire approach to proportionality review under the "cruel and/or unusual punishment" clauses may appear both surprising and startling. California courts are ignoring the wise counsel of this Court in Solem v. Helm (1983) ___ U.S. ___ [103 S.Ct. 3001, 3009 fn. 16, 3010 fn. 17, 77 L.Ed.2d 637, 649 fn. 16 817]; Rummel v. Estelle (1980) 445 U.S. 263, 284 and Coker v. Georgia (1977) 433 U.S. 584, 592 and are now embarked on a subjective, case-by-case review of the proportionality of all felony-murder sentences in California. Such review includes comparing the sentences received by accomplices to the same crime such as Beheler and respondent in this case. In People v. Dillon, supra, the California Supreme Court reduced a defendant's conviction to second degree murder. As part of its analysis, the state high court found it significant that none of the defendant's accomplices served any time. (34 Cal.3d at 488.)

weapon and was not as inebriated as Beheler." (Id. at 258-259.)

On the same day this Court denied certiorari in respondent's case, Beheler filed a petition for hearing with the California Supreme Court (attached as App. C) requesting that his conviction now be further reduced! He sought to have his case remanded to the California Court of Appeals for reconsideration of his sentence "since a more culpable co-defendant [respondent Howard] has received a lighter disposition" (App C. at p. 2) On May 17, 1984 the California Supreme Court denied Beheler's petition. However, such a denial will not preclude other collateral attempts by Beheler to lower his sentence. (See, e.g. In re Foss 10 Cal.3d 910, 916; People v. Cooper (1984) 153 Cal.App.3d 480, 482 fn. 1.) 4/

4/ Petitioner will provide a certified copy of the California Supreme Court's order in People v. Beheler, supra, as soon as possible.

Thus, Beheler, has and could continue to attempt to additionally decrease the measure of his culpability by relying on the prospect that respondent may go free due to this Court's denial of certiorari. The end result could be that two murders will serve minimal time for the murder they undoubtedly committed. Certainly, their punishments will be in no way proportionate to the crime of first degree murder nor in relation to each other.

It has been indicated that petitions for rehearing to this Court are not "an empty formality" and that denial of certiorari does not necessarily signal approval of a lower court opinion. (Flynn v. United States (1955) 75 S.Ct. 285, 286 (Frankfurter, J., Circuit Justice) cited in United States v. Ostrer (S.D. N.Y. 1976) 422 F.Supp. 108, 109.) Previously, petitions for rehearing have been granted to secure uniformity of decision and promote

"interests of justice." (See, e.g. Gondeck v. Pan American Airways (1965) 382 U.S. 25, 26-27; United States v. Ohio Power Co. (1957) 353 U.S. 97, 98-99 and cases cited therein; Massey v. United States (1934) 291 U.S. 608, 609-610.)

This Court's decision to neither hear nor remand respondent's case affects not just respondent's case, but Beheler's as well. The prosecution has been deprived of evidence essential to convict an unquestionably guilty man since it was respondent's confession which corroborated the testimony of accomplice witness Daniel Chavez. Moreover, while respondent benefits from an unwarranted and faulty extension of Miranda v. Arizona, supra, the man whose conviction this Court did uphold in California v. Beheler, supra, remains in prison and tries to further artificially deflate his sentence.

Petitioner respectfully submits that this Court should rehear the respondent's case and

grant the petition for writ of certiorari. This Court should either reverse the decision of the California Fifth District Court of Appeal below or remand this case to that court in light of California v. Beheler, supra.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, Ward Allen Campbell, a Member of the Bar of the United States Supreme Court, do hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 51.2 of the Rules of the United States Supreme Court.

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APPENDIX A

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Howard, 5 Crim. 5181 (filed July 16, 1982)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim. No. 5181
Plaintiff and Respondent,	)
v.	) (Super.Ct.No. 20967)
ROSCOE HOWARD, JR.,	) O P I N I O N
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Kern County. Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy

Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

Appellant, Roscoe Howard, Jr., and codefendants were charged with violations of Penal Code sections 664/211 (attempted robbery) and 187 (murder). As a special circumstance it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

These are the facts:

Daniel Chavez, one of the original codefendants in appellant's case, was granted immunity and testified against appellant.

On February 20, 1980, appellant, Daniel Chavez, and Jerry Beheler drove to Beheler's Bakersfield home. Appellant had in his possession his father's 357 magnum and he agreed with the others that it would be possible to "take" some hashish from a woman at the Palms Liquor Store.

At Beheler's house, Danny Wilbanks joined the three in planning the robbery. Wilbanks began to handle appellant's gun, which had been lying on the table. He

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removed the bullets from the gun, and said he only needed one bullet, and then reloaded the gun. Appellant retrieved the gun, replaced it on the table, and warned Wilbanks not to play with it. Chavez and appellant wanted to use the gun to bluff the robbery victim only. However, they concurred that the gun might be necessary as protection against a friend of the woman's who had a knife.

Using Beheler's car, Wilbanks drove the other three to the liquor store. Appellant's gun rested on his lap. Appellant cautioned Wilbanks that the gun did not have a safety and that no one was to be killed. The plan was to leave if the woman did not give them the hashish.

After the three entered the store's parking lot, a woman, Peggy Dean, approached them. She stated that she had not expected them and then handed Wilbanks

a tinfoil package. She saw the gun and inquired as to its purpose. Chavez said it was for protection. She indicated she had 12 more "grams." Other foil packages were visible in her hands. Wilbanks pointed the gun at her and demanded the rest of the hashish. She said she did not think he would fire the gun. However, despite appellant and Chavez' protests, Wilbanks shot her once. The four men then drove away.

Appellant gave Wilbanks instructions on how to return to Beheler's house. Appellant also regained possession of the gun at this time. Upon their arrival at Beheler's house, appellant hid the gun in the back yard and left with Chavez through a back gate. Appellant threw the gun's remaining bullets away.

At trial Kern County Deputy Sheriff Lantz testified that he interviewed Jerry

Beheler. Beheler identified Wilbanks as the shooting perpetrator and also told the deputy he thought the gun was in his back yard. Additionally, he indicated that two other people were also present during the incident, naming appellant and Chavez.

Lantz was directed to transport Beheler to the sheriff's department. On their way, Lantz asked Beheler to point out the homes of the other two "witnesses" and Beheler complied by showing him appellant's and Chavez' homes. Lantz knocked on appellant's door, but neither appellant nor Chavez answered. Lantz then contacted Chavez' father next door and left word that the police wanted to talk to his son.

After finding the gun hidden in Beheler's back yard, sheriff's investigator Ray interviewed Beheler. Beheler

admitted he had gone to the scene of the crime in order to rob the decedent. He also stated appellant went along "for the ride" and had nothing to do with the robbery.

The next morning, at the urging of Chavez' father and Beheler, appellant and Chavez called the sheriff's department. They were transported to the sheriff's department for interviews. In this interview, appellant admitted the gun was his father's, but initially stated that he had loaned it to either Wilbanks or Beheler for target practice only. He denied any intent to rob the victim, but admitted knowing that Wilbanks planned to rob her. However, he then admitted that Beheler had wanted the gun for use in the robbery and that he (appellant) knew that. He also denied

knowing the gun's whereabouts. He further denied any knowledge of Wilbanks' apparent design to shoot the victim and maintained that he planned to contact the police despite being scared. Upon completion of the interviews, appellant and Chavez were transported back to their homes by the sheriff's department.

Appellant was arrested several days later. At this time he was given his Miranda rights and was re-interviewed. He told Detective Ray that he and Beheler had procured the gun from appellant's house to rob the victim. Appellant and Chavez agreed only to use the gun as a bluff. He admitted that he and Chavez had hidden the gun.

An autopsy revealed that Peggy Dean died of a gunshot wound to the head.

Appellant testified in his own behalf.

He claimed he was just going along for the ride the night Danny Wilbanks shot Peggy Dean. He denied any complicity in her murder and any knowledge of Wilbanks's actual intent to rob her, but admitted his participation in discussion of a plan to rob her by bluffing with his father's gun. He admitted assisting in hiding the gun and bullets.

At trial, the People moved for admission of appellant's statements made to a sheriff's investigator on February 21 and 26, 1980. A hearing on this motion was held and the court granted the motion to admit appellant's statements. The facts developed at this hearing are as follows:

On February 20, 1980, Kern County Deputy Sheriff Lantz responded to a call at Palms Liquor Store in Bakersfield. Upon his arrival he found the body of the decedent, Peggy Dean. Lantz was directed

by the desk officer to a home about a block and a half away from the liquor store. Lantz talked to Jerry Beheler.

Beheler told Lantz that his half-brother, Danny Wilbanks, shot Dean. He knew where the gun was, but did not explain how Wilbanks got it. Beheler further told the officer that appellant and Chavez were also present.

Lantz was instructed to transport Beheler to the sheriff's department. He was told that he was not under arrest.

At Lantz' request, Beheler showed Lantz appellant's and Daniel Chavez' residences. No one answered the door at appellant's house, but Lantz talked to Angelo Chavez, Daniel's father, at the Chavez home. Lantz told Mr. Chavez that if he should be contacted by his son, he should tell his son to contact the sheriff's office as soon as possible as

they were interested in asking him questions because they had information his son had been present at a shooting.

Before Beheler was interviewed at the sheriff's office, sheriff's investigator Ray found a handgun hidden in Beheler's back yard.

Ray taped an interview with Beheler in which Beheler told him that he and three others, including appellant, had gone to the liquor store to rob Dean of hashish and that appellant had provided a gun to Wilbanks for that purpose. He also told Detective Ray that Chavez and appellant had left his house on foot and they seemed worried and scared.

By the end of the interview, Ray considered appellant and Beheler as possible murder suspects. Beheler was allowed to leave. He had been neither arrested nor restrained. As Beheler

left, Ray asked him to tell appellant and Chavez to contact the sheriff's department if possible.

The following day Chavez called Detective Ray and indicated that he and appellant would talk to the police. Chavez' father had urged them to call the police. Beheler also contacted them and advised them to call the police because he felt the police only wanted statements and were after Wilbanks.

Detective Ray sent a deputy to pick up appellant and Chavez at their respective residences. Ray conducted a 12-minute interview with appellant. Appellant told Ray that Beheler had gotten the gun from him to rob Peggy Dean. At that point, Ray testified that he considered appellant a suspect. This interview was taped. At no time during this interview did Detective Ray advise appellant of his Miranda

Miranda rights. After interviewing appellant and Chavez, Detective Ray released them and provided them transportation home. No arrests were made at that time. After the interview, Detective Ray told each of the individuals they should stay around town. Detective Ray indicated he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether an arrest would be made. He admitted this was not normal procedure in homicide cases.

An all-points bulletin was broadcast for the arrest of Daniel Wilbanks on February 21, 1980. Appellant, Beheler and Chavez remained at large after they had each given their taped interviews to the detectives. Later in the evening on February 21, 1980, Daniel Wilbanks turned himself in at the sheriff's office

in Lancaster. On February 25, 1980, a warrant for the arrest of the other three participants, including appellant, was issued and they were arrested on February 26, 1980. After their arrest each gave a second taped statement to the detectives. At this time each was advised of his constitutional rights. They each waived them and gave full statements concerning the instant case.

I

Appellant's primary contention on appeal is that the court erred when it admitted the statements of appellant because appellant had not been advised of his Miranda rights during the February 21st interview. Appellant contends that pursuant to Miranda v. Arizona (1966) 384 U.S. 436, appellant was in custody during the February 21st interview and thus entitled to have the Miranda admonitions. Furthermore, appellant contends

that custody arises, at the "latest," at the point when the investigating officer has probable cause to believe that the person being questioned has committed an offense. Appellant apparently contends that the police had probable cause to arrest appellant prior to the time of the February 21st interview and that consequently it was necessary that appellant be given his Miranda rights before any interrogation.

Respondent's primary argument is that appellant was not entitled to Miranda admonitions during the February 21st interview because he was not in custody.

In Miranda v. Arizona, supra, 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation

must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of

rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Also, as to conflicting testimony, the appellate courts must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753;

People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145 Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L. Ed. 2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal. Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975 15 Cal.3d 419, 443

[124 Cal.Rptr. 752, 54 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal. Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal. Cal.App.3d 300, 306-307 [116 Cal. Reptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p.

at p. 449.)" 1/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his

1/ Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App. 3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, at pp. 477-478; People v. Patterson (1979) 88 Cal. App.3d 742, 747.)

freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We must then consider the facts of the instant case in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his statement to sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694 . . . .)"

The California Supreme Court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions.

The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that the investigation had focused on the defendant, the officer did not intend

to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill, supra, 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) The United States Supreme Court has also addressed the issue of when a suspect is entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.)

Appellant in the instant case was interrogated in a small room at a police station. Two other officers were present. As stated above, usually an interrogation

at a police station is deemed inherently coercive. However, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the issue of whether appellant in the instant case was in custody during the February 21st interview will hinge on the other three factors discussed in People v. Herdan, supra, 42 Cal.App.3d 300.

(2) Whether The Investigation Had Focused On The Suspect

Appellant relies heavily on this factor. As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether an investigation has

focused on the suspect, is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21st interview, but he "apparently" contends that he was entitled to have Miranda warnings because there was probable cause to arrest him at the time of his interview. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's

Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The "police" had a substantial amount of information implicating appellant in the attempted robbery-homicide before they interviewed him on February 21st. They knew from Beheler appellant and the two others had discussed robbing the victim at Beheler's home, that appellant had furnished Wilbanks the loaded gun for that purpose, that they then drove to the liquor store to rob the victim of her hashish, and that appellant and Chevez had left after the shooting, "scared." The police had found the gun hidden in Beheler's back yard. They further admitted appellant was a "possible suspect" by

them and had appellant not gone to the sheriff's office voluntarily, a warrant would have been issued for his arrest.

It is clear from the record that the investigation had focused on appellant, among others, before the February 21st interview, and further, the police had sufficient information to constitute probable cause to arrest appellant. In fact, an "all-points" bulletin had already been put out for Wilbanks.

At the interview appellant told the police that they, the four suspects, intended to rob the victim of her hashish, and this was why he obtained his father's gun and gave it to Wilbanks. And yet, even at this point during the interview, the police did not Mirandize appellant.

As discussed above, the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody"

issue. However, upon the above facts, it is significant and entitled to great weight.

(3) Whether The Indicia Of Arrest Were Present.

Appellant and Chavez were interviewed in a small interroation room at the police station. Two police officers were present. Appellant was not told he was not in custody or that he was free to leave when he wanted. However, when he gave the second statement after he was arrested and Mirandized, he was asked if he agreed with the statement "You were not in custody at that time." Appellant replied, "That's right." Appellant and Chevez were not arrested at the end of their interview. In fact, the officers furnished them transportation home. However, Chavez and appellant were specifically told not to leave town. In People v. White, supra, 69 Cal.2d 751, the police officer admitted that he did not intend to permit the

defendant to leave the police station without explaining the evidence. On the other hand, in the instant case, Chavez and appellant were permitted to leave the police station following the first interview. Their friend, Beheler, had also given a statement to the police and was permitted to leave. In addition, there was testimony that Chavez and appellant felt they would be able to leave after their interview as well. On balance, and giving substantial weight to appellant's belief at the time that he was not in custody and the fact that he was not arrested at the end of the first interview, we conclude that the indicia of arrest were not present on February 21st.

(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be

deemed to be in custody pursuant to Miranda. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.)

In the instant case the interrogation of appellant on February 21, 1980, was designed to produce incriminating responses. Before the officers interrogated appellant they knew he was involved in the attempted robbery and/or homicide of the victim. At the beginning of the interview the police immediately began to ask appellant questions regarding the incident. It is apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. For example, at one point during the interview appellant told the officers that he loaned his gun to Danny Wilbanks because he wanted to do some "target practice."

The police officers immediately seized on this and asked appellant, "Well, Jerry Beheler told us that, that the intention of him going over there was to rob her." Appellant's response was, Yeah, yeah, yeah." The officers asked, "That's why he got the gun from you?" Appellant replied, "Yeah, yeah." Continuing, the officers asked, "So he got the gun from you and then you guys all got in the car, went down to the liquor store . . ." Appellant responded, "Yeah." "And Danny's intent was to rob her of her hash?" Appellant responded, "Yeah, just, just, yeah, just to get her hash and that's it."

We conclude that when the police confronted appellant with the evidence they had received from Jerry Beheler this was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra. (See People v. White, supra,

69 Cal.2d 751, 760-761.)

As previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595. In the instant case there appears to be no conflicting testimony. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude, from our independent review of the record, that the respondent has not met its burden of establishing the voluntariness of appellant's statement beyond a reasonable doubt. Further, we conclude the incriminating statements from the February 21st interview should have been suppressed by the trial court.

Almost immediately after the shooting here, the police identified the four suspects and interviewed Beheler. He named all the other coparticipants. Based on Beheler's statement, an "all-points" bulletin was immediately put out on Wilbanks and the police immediately went in search of appellant to question him. At the time of the February 21st interview, they had "focused" upon appellant and the others and had probable cause to arrest them. Yet, appellant was not then Mirandized. In the course of the interrogation, by artful questioning and confrontation with Wilbank's statements, appellant confessed to felony murder. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession

is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.)

In sum, we hold that appellant was in custody during his February 21st interrogation. His statements at this interrogation were wrongfully admitted because he was not advised of his Miranda rights prior to the interview and, as stated above, the wrongful introduction of a confession is reversible error, per se.

II.

Appellant's last contention on appeal is that the trial court erred in failing to instruct the jury in the law of conspiracy. In the instant case it was the prosecution's theory that appellant was an aider and abetter during the attempted commission of the robbery and therefore was liable for the victim's murder on a felony murder theory. It was appellant's theory that the victim's death resulted

from the independent act of a coconspirator.

There is no merit to this argument.

After argument by both sides, the court ruled that it would not give conspiracy instructions. The court apparently felt that since there was no evidence whatsoever that appellant withdrew or abandoned his intent to rob, conspiracy instructions were not mandated.

The court gave CALJIC No. 8127--first degree felony murder--aider and abetter, to the jury. This instruction reads as follows:

> "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of [robbery], all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

In addition, the court gave a special instruction submitted by appellant. This instruction was very similar to CALJIC No. 8.26--first degree felony murder in pursuance of a conspiracy. This special instruction read as follows:

> "If a human being is killed by anyone of several persons engaged in the perpetration of, or attempt to perpetrate the crime of robbery and if the killing is done in furtherance of a common design to commit such crime or if the killing is a natural and reasonable or probable consequence of any act knowingly aided or encouraged by the defendant, then all such persons so jointly engaged are guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental."

The court also gave a special instruction offered by the People. This special instruction read as follows:

> "'A killing' 'in the perpetration of' a robbery attempt need not have been committed for the purpose of perpetrating the robbery; it is sufficient that the two acts, that is, the robbery attempt and the

killing, be part of one continuous transaction. If such is the case, then the killing so committed constitutes a murder in the first degree."

This language comes from People v. Johnson (1972) 28 Cal.App.3d 653, 658. The court also gave CALJIC No. 8.21, first degree felony murder. This instruction reads as follows:

"The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there is in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery in the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

Appellant contends that his special instruction which contained some of the concepts contained in the conspiracy instructions was negated by the fact that the court also gave CALJIC No. 8.21 and CALJIC No. 8.27, supra. Appellant contends

that "It would seem that with the giving of these conflicting instructions the jurors would be thoroughly confused as to the state of the law."

Appellant seeks to rely on the testimony that he repeatedly said he did not want Danny Wilbanks to use the gun on the victim of the robbery, to absolve his responsibility in the death of the victim. However, there was uncontradicted testimony appellant participated in the planning of the robbery, supplied the lethal weapon to his coparticipant, accompanied his coparticipants to the scene of the crime, and further aided and abetted the crime by assisting in the escape and the disposal of the gun and bullets. While there is evidence appellant did not want Danny Wilbanks to fire the gun, there was no testimony whatsoever appellant ever intended to withdraw from the

underlying crime of robbery. Thus, appellant's contention cannot stand. In addition, appellant's argument that he was precluded from arguing withdrawal is negated by the fact that the court in the instant case gave CALJIC No. 3.02--termination of liability for aiders and abetters. This instruction reads as follows:

> "One who has aided and abetted the commission of a crime, with knowledge of the unlawful purpose of the perpetrator of a crime, may end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission."

Thus, appellant's argument fails and the trial court was entirely correct in refusing to instruct the jury on the law of conspiracy.

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For the reasons previously stated, the judgment is reversed and remanded for new trial.

MARTIN
J.*

WE CONCUR:

ZENOVICH
Acting P.J.

HANSON (P.D.)
J.

*Assigned by the Chairperson of the Judicial Council.

APPENDIX B

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Beheler, 5 Crim. 5136 (Filed December 16, 1982) and Modification Thereof (Filed January 12, 1983).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	
Plaintiff and Respondent,	5 Crim. No. 5136
v.	(Superior Court No. 20967)
JERRY LAIN BEHELER,	O P I N I O N
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, Arnold O. Overoye, Assistant Attorney General, Eddie T. Keller and Janice Rogers Brown, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664, 211 and 187.)

Appellant, Jerry Lain Beheler, and codefendants were charged with violations of Penal Code sections 664, 211 (attempted robbery) and 187 (murder). As a special circumstance, it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants. Daniel Chavez,

one of the original codefendants, was granted immunity and testified against appellant.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

FACTS

On February 20, 1980, appellant, Jerry Beheler, stayed home drinking beer, talking and playing dominoes with some friends. During the day, he and his friends made alternate trips to the nearby Palm Liquor store to buy more beer. On one of these trips, appellant and a friend named Keith were approached in the parking lot of the liquor store by Peggy Dean who asked Keith if he was interested in buying hashish. Appellant testified that he refused Dean's offer as he did not have enough money. After purchasing several quart bottles of malt liquor, appellant and his friend Keith returned home to continue the domino game.

Sometime in the late afternoon, appellant, his step-brother, Danny Wilbanks, and Roscoe Howard drove to Daniel Chavez' house. Chavez and Howard were long-time neighbors and good friends. Chavez had only known appellant for a short time.

Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams.

At appellant's home, Daniel Chavez noticed that Howard had a 357 magnum pistol with him. He recognized the gun as it belonged to Howard's father. While at the house, Chavez, Howard and appellant discussed returning to the liquor store and threatening Peggy Dean with the gun to get the hash. Others testified that appellant

come up with the idea. Chavez testified that he and Howard did not want to threaten Peggy Dean with the gun. They actually discussed several plans for taking the hash. After Chavez, Howard and appellant decided they did not want to do the act, Wilbanks volunteered. Chavez said that appellant was too drunk to do it anyway. Wilbanks got the gun and started flashing it around. He took all the bullets out except one and said he only needed one. Howard told him not to be joking with the gun, took it from him and then reloaded it.

With Danny Wilbanks driving appellant's car, all four men left the house and headed for the liquor store. Chavez was in the front passenger seat. Appellant was in the rear seat behind Wilbanks. Howard sat behind Chavez. Wilbanks, with the gun on his lap, drove into the parking lot on the south side of the liquor store. Two women and a

man were sitting on the bumper poles along the south side of the store. Peggy Dean got up and walked over to the car. She said, "I didn't think you guys were going to show up." She handed Danny Wilbanks a foil-wrapped bindle the size of a marble and told him she had "twelve more in her hand." Ms. Dean leaned in the car window and observed the gun on Wilbanks' lap. She asked what the gun was for. Chavez told her it was for protection. Wilbanks pulled out the gun and pointed it at Ms. Dean and said, "Let me have it all." Ms. Dean recoiled and stepped back from the window and said to Wilbanks, "You're not going to use that on me."

Chavez and Howard urged Wilbanks to leave the place with the one bindle he had. Appellant was still sitting silently in the back seat. Despite the warning, however, Wilbanks pulled the trigger. The bullet struck Peggy Dean just above her right eye,

passed through the soft tissue of the brain and out of the back of her skull. She crumpled to the pavement and a flow of bindles spilled from her hand.

Ms. Dean's companions were still sitting on the curb posts, immobile. A pickup truck pulled into the parking lot and Chavez reached over and turned on the ignition. He told Wilbanks, "Let's get out of here." Wilbanks put the car in gear and drove off. He drove erratically--skidding and stopping--back to appellant's house.

Back at the house, they told appellant's wife about the murder. Wilbanks, while crying, repeatedly stated that he had killed Ms. Dean.

Appellant's memory of the events at the liquor store was quite limited. He remembered hearing a loud report from a gun. He lifted his head in time to catch a glimpse of a gun. Then he saw a woman slowly turn

around and fall to the ground. He did not recall the conversation in the car. He did not remember the drive home. But he did remember arriving back at the house.

Appellant told Wilbanks that he would have to leave. Chavez and Howard told everyone not to mention this to the police, "Nobody knows nobody, man." Chavez and Howard took the gun into appellant's backyard to hide it. They then took off running along the railroad tracks. Howard disposed of the bullets along the way.

Howard and Chavez first went to Chavez' house where Chavez changed his shirt. Then they went next door to Howard's house. Later, they walked to a friend's house and spent the night.

Appellant and his wife went to a neighbor's house and briefly related the story. They called the police who arrived almost immediately. Deputy Lantz, who was

investigating the scene at the Palm Liquor store parking lot, was ordered to respond to the neighbor's residence. Appellant informed him that his brother had killed the woman at the Palm Liquor store parking lot and that the gun was in his backyard somewhere. Appellant gave the officers permission to search his yard and his automobile. The gun was found in the backyard. It was hidden under some leaves and brush and wrapped in a yellow cloth.

Later in the early morning hours of February 21, appellant agreed to go to the sheriff's office for a more detailed interview. In addition, he took the sheriff's officers to the houses on Churchill Drive where Roscoe Howard and Daniel Chavez lived.

At the sheriff's department, appellant gave the investigators a detailed taped statement. The taped statement was

introduced into evidence. Appellant told the officers his half brother, Danny Wilbanks, had shot a woman in the parking lot of the Palm Liquor store. He gave the officers several details regarding the alleged incident. At one point, the taped interview concluded.

The officers then called appellant back into the interview room to ask him some more questions. The officers got appellant to reaffirm that Danny Wilbanks had a 357 magnum gun which he had gotten from Roscoe Howard. The officers asked appellant why he got the pistol from Howard at that time. Appellant responded, "it was for the purpose of robbery." Appellant admitted that the plan was to go down to the Palm Liquor store and take the "dope" away from Peggy Dean. Appellant admitted that he knew the purpose of going to the Palm Liquor store was to rob Peggy Dean of hashish. The officers asked

appellant why he went along with Wilbanks to go rob Peggy Dean. Appellant replied, "I'm his brother. I mean, if there's a way that I knew that I could have kept him from doing what he did I would have done it, if I'd have known that he was fixing to do what he had done I could have prevented it. This was just something that was unforeseen." The officers also got appellant to admit that Roscoe Howard and Daniel Chavez knew about the robbery but that "None of us had any idea that he was going to kill this lady." The officer specifically asked appellant, "But they had an idea that he was going to rob her?" Appellant replied, "Well, they knew that he was going to take her hashish." After the interview, appellant was returned to his home.

Later that day, appellant called Roscoe Howard and Daniel Chavez and convinced them to cooperate with law enforcement

officials. They also agreed to come to the sheriff's office. Their statements were tape recorded.

Several days later, the four men were arrested. Appellant, Howard and Chavez waived their Miranda rights at that time and each gave a second tape-recorded statement substantially corroborating each other.

DISCUSSION

I

Appellant contends that the admission of his tape-recorded statements constitutes reversible error because he was in custody at the time he gave those statements. [1/] He stresses that because suspicion had focused on him at the time of

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1. During the trial, a hearing was held outside the presence of the jury and the court found that the first taped statement "was voluntary and did not need to have a Miranda." Appellant's first non-Mirandized statement was thus ruled admissible as well as his second Mirandized statement made shortly after his arrest.

the first taped statement and the site of the interrogation was at the police station, he "was in custody at the time of his tape recorded interrogations." He contends that the police had probable cause to arrest him at the time of the first taped interrogation. Moreover, he argues that the length and form of questioning "clearly supports a finding of custodial interrogation." We agree.

In Miranda v. Arizona (1966) 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or

indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Moreover, as to conflicting testimony, the appellate courts

must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753; People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation' is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145

Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L.Ed.2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal.Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975) 15 Cal.3d 419, 443 [124 Cal.Rptr. 752, 541 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal.Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation;

(2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 [116 Cal.Rptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p. 449.)" (Emphasis added.) 2/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody

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2. Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App.3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478; People v. Patterson (1979) 88 Cal.App.3d 742, 747.)

is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We begin our discussion by considering the facts in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his taped statements to the sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this

is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694. . . .)"

The California Supreme court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, 66 Cal.2d 438, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The

district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions. The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that

the investigation had focused on the defendant, the officer did not intend to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill (1969) 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) However, in Hill, the defendant's initial statements to the police were not in reply to questions designed to elicit incriminating responses and in Sam, the defendant was not even a suspect during the first two conversations with the police.

The United States Supreme Court has also addressed the issue of when a suspect is

entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.) Respondent here relies heavily on this case.

In Mathiason, supra, in response to a telephone call, the defendant, a parolee, voluntarily came to the police station for questioning about a burglary. The state police had investigated a burglary and asked the lady of the house if she suspected anyone. She replied that the defendant was the only one she could think of. The officers tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call. The next afternoon, the defendant did call. The officer asked where it would be convenient to meet and the defendant had no preference. The defendant

came down to the police station and was met by an officer in the hallway who shook hands with him and took him into an office. The officer advised him that he was investigating a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The defendant admitted that he had taken the property. At this point, he was advised of his Miranda rights and the officers took a taped confession. At the end of the taped conversation, the officer told the defendant he was not arresting him at this time and that he was releasing him to go about his job and return to his family.

The United States Supreme Court held that Miranda was inapplicable because Mathiason was not "'deprived of his freedom of action in any significant way.'" (Oregon v. Mathiason, supra, 429 U.S. at p. 495.) Respondent appears to contend that Mathiason

should be read for the proposition that anytime a suspect voluntarily comes to the police station to be questioned he would automatically not be in custody for purposes of Miranda. However, upon a close reading of Mathiason, we do not believe this to be the case.

Mathiason does not indicate that the totality of the circumstances should not be considered in determining when a suspect is in custody for purposes of Miranda. Rather, the court in Mathiason looked at all of the facts and concluded that in that case defendant was not in custody per Miranda. Indeed, the facts of Mathiason are quite dissimilar to the case at bar. Unlike the defendant in Mathiason, appellant here was questioned almost immediately after the crimes had occurred. He was extremely emotionally distraught. This was undisputed. On the other hand, the defendant in Mathiason

was not interviewed until 25 days after the burglary and he was not in an emotionally distraught stage. Moreover, the officers in the instant case had a great deal of information, primarily supplied by appellant himself, that appellant was guilty of attempted robbery and first degree felony murder at the time of his interview. On the other hand, the police in Mathiason called the defendant in for questioning because the victim of the burglary, when asked if she suspected anyone, replied that the defendant was the only one she could think of. (Oregon v. Mathiason, supra, 429 U.S. at p. 493.) This is not the same kind of information linking a suspect to a crime as the police had in the instant case. Additionally, the defendant in Mathiason was a parolee and knew it was incumbent upon him to cooperate with police.

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Appellant here was interrogated in a small room at a police station. Two officers were present. As stated above, usually an interrogation at a police station is deemed inherently coercive. However, as can be seen, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the site of the interrogation factor in determining whether appellant was in custody during the February 21 interview, while relevant, in our opinion is not dispositive. Many factors may have played a part in appellant's decision to come to the police station, not the least of which is the fact that the police failed to inform him of the seriousness of his position. A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal

liability. In addition, the police seized upon the emotion of the moment and encouraged appellant to talk. He was obviously suffering the effects of alcohol and extremely emotionally distraught. While appellant and his other cosuspects may not have been aware of the felony-murder rule,[3/] indeed, the officers in the instant case most certainly were.

(2) Whether the Investigation had Focused on the Suspect.

As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether

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3. Indeed, the prosecutor argued to the jury that appellant was ignorant of the rule.

an investigation has focused on the suspect is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21 interview, [4/] but he contends that he was entitled to have Miranda

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4. Before the officers took appellant to the police station for further questioning, Detective Lanz testified that "we stood in the yard near his doorway for some time discussing the shooting and the circumstances immediately after the shooting." Lanz informed appellant that they would prefer to interview him in depth concerning the circumstances surrounding the shooting at the sheriff's department. Lanz testified he asked appellant if he had any objection and that he explained to appellant he was not under arrest, but that going down to the sheriff's department "would merely facilitate a speedy conclusion to the interview." According to Lanz, appellant agreed to go down to the sheriff's department because "it was his desire to bring the investigation to a conclusion as soon as possible." (Emphasis added.)

warnings because there was probable cause to arrest him at the time of his interview, citing In re James M. (1977) 72 Cal.App.3d 133. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The sheriff's officers in the instant case had a substantial amount of information implicating appellant in the attempted robbery-homicide before they

conducted their first taped interview on February 21. Indeed, they knew from appellant himself that: he and the others had discussed robbing the victim at appellant's home; they drove to the liquor store to rob the victim of her hashish; Wilbanks had fired the fatal shot; the suspects had driven in appellant's car; and the gun was found hidden in appellant's backyard.

Clearly, the officers knew by the time of their first interview with appellant at his home that appellant was involved, at least as an accomplice, in the attempted robbery of Peggy Dean. Likewise, they knew full well that appellant was undoubtedly implicated in the felony murder of Peggy Dean.

From our reading of the record, it is clear that the investigation had focused on appellant, among others, before the

February 21 interview conducted at the police station, and further, the police had sufficient information to constitute probable cause to arrest appellant.

Moreover, the officers initially ended the first taped interview and then called appellant back in. At this point, they specifically interrogated him concerning his knowledge of the plan to rob Peggy Dean and his knowledge of the purpose for the gun. Appellant freely admitted his knowledge and participation in the attempted robbery and yet, even at this point in the interview, the police officers did not Mirandize appellant.

Even though the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody" issue, we conclude that on the above facts it is significant and entitled to great weight.

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(3) Whether the Indicia of Arrest Were Present.

Appellant was interviewed in an interrogation room at the sheriff's department. Two officers were present. As mentioned, supra, the officers testified he was told he was not under arrest and the officers believed that he was not "in custody" at the time of the interview. Whether the officers believed that he was in custody or not is irrelevant. Later when appellant gave his second Mirandized statement after he was arrested, he was asked if he agreed with the statement that he was not in custody during the first interview. Appellant stated that he agreed with that assessment. Appellant did not testify at the hearing and his trial counsel did not cross-examine the sheriff's officers on this point. Instead, appellant's trial counsel concentrated on the voluntariness argument

because appellant was extremely emotionally distressed and obviously under the effect, at least to some degree, of alcohol at the time of his interview.

Appellant was permitted to leave at the end of the interview. However, Detective Ray told appellant that he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether arrest would be made. From the record, we cannot tell whether he was in fact told not to leave Bakersfield.

In our opinion, there was little indicia of arrest present on the February 21 interview other than the fact that the interview took place at the sheriff's station. Thus, we conclude this factor does not balance heavily toward appellant.

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(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be deemed to be in custody pursuant to Miranda. Appellant's taped interview lasted approximately 30 minutes. Moreover, he had been extensively interviewed at home prior to the interview at the sheriff's department. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.) There is no doubt in the instant case the interrogation of appellant on February 21 was designed to produce incriminating responses. Before the officers interrogated appellant on tape they knew he was involved in the attempted robbery and/or homicide of the victim. Indeed, appellant himself had

supplied that information. It is quite apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. Appellant was asked about the plan to rob Peggy Dean. Appellant was asked about his prior contact with her. Indeed, appellant gave the officers many details regarding the incident in question. Appellant admitted that he knew Wilbanks had a gun. He admitted he knew the purpose was to rob Peggy Dean. He was specifically asked why he went along. Essentially, his response was that if he had known Wilbanks was actually going to use the gun he might have been able to prevent it. In essence, appellant confessed to felony murder.

On this record, we conclude that the form of the questioning of appellant during the February 21 taped interview was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra, 446

U.S. 291. Respondent's contention that the questions were merely "investigative in nature, not accusatorial" is totally without merit. (See People v. White, supra, 69 Cal.2d 751, 760-761.)

As we have previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595.) In the instant case, there appears to be no conflicting testimony on the Miranda issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21

interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.) 5/

Because of our decision on the Miranda issue, we find it unnecessary to address appellant's numerous other contentions at this time. These issues are

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5. This court recently reversed the conviction of Roscoe Howard, one of appellant's original codefendants. (People v. Howard (July 16, 1982) 5 Crim. No. 5181, hg. den.) The reversal was based on an almost identical Miranda violation.

either currently pending in the California Supreme Court, or are unlikely to arise again in any subsequent retrial of appellant.

For the reasons previously stated, the judgment is reversed and remanded for a new trial.

ZENOVICH
J.

WE CONCUR:

FRANSON
Acting P.J.

QUALL
J.*

* Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	5 Crim. 5136
Plaintiff and Respondent,	(Super. Ct. No. 20967)
v.	
JERRY LAIN BEHELER,	MODIFICATION OF OPINION ON DENIAL OF REHEARING
Defendant and Appellant.	

The opinion filed herein on December 16, 1982, is modified as follows:

On page 3, line 6, "Chavez testified" should be added after first full sentence and "However, appellant testified he refused the lady's offer as he did not have enough money" should be added at the end, so that the second paragraph on page 3 reads:

"Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Chavez testified appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams. However, appellant testified he refused the lady's offer as he did not have enough money."

On page 21, the sentence should be stricken and the following inserted in its place:

"The judgment is reversed and remanded for a new trial charging appellant with no offenses greater than voluntary manslaughter. (See People v. Taylor (1974) 12 Cal.3d 686.)

The petition for rehearing is denied.

ZENOVICH
j.

I CONCUR:

FRANSON
Acting P.J.

APPENDIX C

Copy of Petition for Hearing to the Court of the State of California in People v. Beheler, 5 Crim. 5136 (F000633) (Dated April 30, 1984)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	Crim. _____
Plaintiff and Respondent,	)	5 Crim. No. 5136 (F000633)
v.	)	(Super. Ct.No. 20967)
JERRY LAIN BEHELER,	)	
Defendant and Appellant.	)	

PETITION FOR HEARING

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	Crim. No. _____ 5 Crim. No. 5136 (F000633) (Super. Ct.No. 20957)

PETITION FOR HEARING

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The petitioner, Jerry Lain Beheler, respectfully petitions this Honorable Court for a hearing after the decision of the Court of Appeal, Fifth Appellate District, affirming and modifying petitioner's conviction to voluntary manslaughter. A copy of the published decision, filed March 19, 1984, is attached hereto as Exhibit A. A copy of the

denial of Mr. Beheler's petition for rehearing is attached hereto as Exhibit B.

Petitioner requests this Court to grant hearing and remand petitioner's case to the Fifth District Court of Appeal in light of today's decision by the United States Supreme Court in a co-defendant's case. Petitioner is entitled to reconsideration by the Court of Appeal regarding the proportionate punishment for him, since a more culpable co-defendant has received a lighter disposition, and the appellate court relied on People v. Dillon (1983) 34 Cal. 3d 441.

NECESSITY FOR HEARING AND REMAND

On Monday, April 30, 1984, the United States Supreme Court denied the State of California's petition for writ of certiorari in the case of California v. Howard 82-976. Mr. Howard was a convicted co-defendant of Petitioner Beheler. Both Mr. Beheler and Mr. Howard received reversals of their convictions by the Fifth District Court of Appeal in 1982 on the same ground, to wit: failure of the state to advise them of Miranda rights. (Ex. "A", Opn. p. 9 fn. 4.) However, the United States Supreme Court treated these two defendants disparately. The state's petition for certiorari was granted in petitioner's case and his reversal was summarily over-turned by the United States Court. (California v. Beheler (82-1666) (1983) ____U.S.____; 77 L.Ed.2d 1275.)

Today's action by the United States Court creates yet another inequity in this case. Briefly, four men were charged with capital

felony-murder in Bakersfield, They had driven to a liquor store to steal some hashish from a woman in the parking lot. By all accounts petitioner was so drunk that he was virtually passed out in the back seat (see Ex. "A" 21-24). Mr. Willbanks was also inebriated, but not as severely as Mr. Beheler. Mr. Willbanks drove the car to the location, and wantonly killed the woman. The two men in the car who were not intoxicated were Mr. Chavez, who received total immunity, and Mr. Howard.

Upon learning of the crime, Mr. Beheler immediately contacted law enforcement. He asked them to come to his home, he told them everything he knew, he showed them the car, the gun. He drove in the patrol car to the other co-defendants' houses, knocked at the door and tried to convince them to answer police questions. He was taken to the station and interrogated on a tape recorder. He was released at approximately 3 o-clock a.m., having confessed to

vicarious felony-murder without ever being informed about his own potential criminal liability, and without being advised per Miranda. Thereafter, he further assisted the police by persuading Chavez and Howard to turn themselves in.

Mr. Beheler went to trial first. He presented a valid diminished capacity defense. However, delivery of the faulty instruction on aiding and abetting (vicarious liability) prevented the jury from reaching or deciding the question of his mental state (see People v. Beeman (1984) 35 Cal.3d 547). He was convicted and sentenced to life without parole.

Mr. Howard was also convicted and similarly sentenced.

However, the direct perpetrator who relied upon diminished capacity (utilizing the same expert witness) received a verdict of voluntary manslaughter as a lesser included offense. The perpetrator's diminished capacity defense was

not obviated by delivery of the Beeman instruction.

The Fifth District Court of Appeal reversed both petitioner's and Howard's convictions and life without parole sentences due to Miranda violations. The state sought hearing in both, and sought certiorari in both.

Last year the United States Court overturned petitioner's reversal and remanded the case to the Fifth District Court of Appeal. The United States Court did not act on the Howard petition until today.

In the meantime, the Fifth District Court of Appeal considered petitioner's case anew. Since Howard's case was still pending, the Fifth District Court of Appeal probably assumed that it would be remanded in light of California v. Beheler, supra. The Court of Appeal considered all of the factors in petitioner's case, compared the facts with the culpability of other involved parties and determined that this was one of those rare cases in which the judgment

should be reduced to no more than the voluntary manslaughter conviction received by the direct perpetrator.

However, today we learn that Mr. Howard's reversal of conviction has been upheld by the United States Court. Mr. Howard possessed and supplied the murder weapon. Mr. Howard was not under the influence of alcohol. Mr. Howard did not attempt to assist law enforcement in every way he could. Instead, Mr. Howard buried the gun, threw away the bullets, and hid from the police for several days. The state has repeatedly announced that no theory exists for prosecuting the aiders and abettors to felony-murder with any crime less than felony-murder. (See Petition for Hearing by respondent below, filed April 25, 1984.) Yet Mr. Howard cannot be retried for felony-murder due to collateral estoppel principles. (People v. Taylor (1974) 12 Cal.3d 686.)

Thus, the result is that the Fifth District Court of Appeal has been denied the opportunity to consider the proportionality impact of a complete reversal for one confederate who was more mentally responsible for his own participation, and who did far less to remedy the situation. In other words, this Court should grant hearing in this case and remand it to the Fifth District Court of Appeal for reconsideration in light of the lenient disposition received by a more culpable co-defendant. Under the Dillon analysis employed by the Fifth District Court of Appeal, this information is critically relevant. (People v. Dillon (1983) 34 Cal.3d 441.)

Petitioner argued on appeal that (1) his conviction should be reversed due to delivery of CALJIC 3.01 (Beeman) in this specific-intent, felony-murder case, (2) his conviction should be reversed because he was in custody for Miranda purposes under independent state con-

stitutional grounds, (3) and also that under Dillon he should be convicted of nothing greater than involuntary murder since voluntary murder requires express intent to kill, and as an aider and abettor Mr. Beheler would have had to at least know, if not share, the perpetrator's intent to kill. The state offered no evidence whatsoever that Petitioner Beheler knew of, let alone shared, the perpetrator's intent to kill.

Thus, the Court of Appeal's decision that petitioner's judgment should be reduced to voluntary manslaughter, instead of involuntary, may be substantially impacted by the more culpable co-defendent's lenient treatment.

As a result, in order to secure uniformity of opinion and proportionality of punishment, this Court should grant hearing and remand this case to the Fifth District Court of Appeal for reconsideration of petitioner's judgment in light of the fact that a more culpable co-defendant has received a complete reversal wherein the state has no theory for retrial.

CONCLUSION

In conclusion, this Court should grant hearing and remand this case to the Fifth District Court of Appeal for reconsideration in light of the lenient treatment ultimately received by a more culpable co-defendant as a result of the United States Supreme Court's disparate treatment of the two cases.

DATED: April 30, 1984

Respectfully submitted

OFFICE OF THE
STATE PUBLIC DEFENDER

JULIA CLINE NEWCOMB
Deputy State Public Defender

Attorney for Petitioner Beheler